STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-027

April 17, 1998

BANGOR HYDRO-ELECTRIC COMPANY
V. RONALD POMEROY
Appeal of Consumer Assistance Division Decision #18888

ORDER REVERSING DECISION ON REMAND BY CONSUMER ASSISTANCE DIVISION

WELCH, Chairman; NUGENT and HUNT, Commissioners

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## I. INTRODUCTION, SUMMARY AND FACTS

This case has come before the Commission once before. An earlier decision by the Commission's Consumer Assistance Division found that a customer of Bangor Hydro-Electric Company (BHE), Mr. Pomeroy, was responsible for the replacement of a pole that he owned. Mr. Pomeroy "appealed" the CAD decision to us. "Appeals" of decisions are a request to the Commission to investigate pursuant to 35-A M.R.S.A. § 1303. We remanded this case to the Consumer Assistance Division (CAD) for further consideration of the Bangor Hydro-Electric Company's (BHE) policies concerning inspection, tree trimming and maintenance of its secondary voltage lines. On remand, the CAD determined that it was BHE's responsibility to replace the pole owned by Mr. Pomeroy. BHE then "appealed" this decision of the CAD (i.e., requested an investigation). In this Order, we open an investigation and reverse the decision of the CAD.[1]

The facts of this case are stated in greater detail in the Order that we issued on October 1, 1996, remanding this case to the CAD. We repeat those facts in summary fashion here.

BHE owns and maintains a distribution line at "primary" voltage (7,200 volts) on Little Narrows Fire Road No. 23 in Etna. At a pole on the distribution line (Pole #24), BHE transforms the power to "secondary" voltage (240/120 volts) and delivers it over a "long service drop" to Mr. Pomeroy's house. The length of the secondary line is 210 feet. At a point 135 feet from the distribution line, the secondary line is supported by a pole that is located on Mr. Pomeroy's land and owned by Mr. Pomeroy. Mr. Pomeroy is required to own the pole pursuant to the terms of

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[1]Commissioner Hunt voted against this decision. See attached Dissenting Opinion.

Section 3-J of BHE's Terms and Conditions, approved by the Commission:

> LONG SERVICE DROP. Whenever it is necessary, in order to supply secondary voltage service to a customer, to locate any pole or poles on private property or to extend secondary voltage service lines more than 150 feet from the roadway measured on the course of such lines, such pole or poles and such lines beyond said 150 feet shall be furnished by the customer and shall be and remain the property of the customer.[2]

In October of 1993, a tree or large branch fell on the secondary line somewhere between the primary voltage distribution line and the pole owned by Mr. Pomeroy. Under Section 3-J it is clear that BHE owns the 150 feet of the secondary power line running from the distribution line to the pole owned by Mr. Pomeroy.

Based on facts submitted by BHE following the remand to the CAD, it appears that BHE believes that the tree that caused damage was located about 75 feet from BHE's Pole #24 and therefore about 60 feet from Mr. Pomeroy's pole. Apparently, a branch broke off from the tree, hitting the wire or wires and causing Mr. Pomeroy's pole to break.

[2]In our earlier decision in this case, we interpreted this provision as requiring Mr. Pomeroy to furnish and own the pole in question although it was located 135 feet from the roadway. We believe this interpretation is correct and is fully supported by the language of section 3-J as a whole. Nevertheless, a casual reading of section 3-J might lead a reader to assume that customers must furnish and own only those poles that are "beyond said 150 feet." BHE should consider making section 3-J clearer.

Another of our recent decisions was less than optimal because of omissions and ambiguities in BHE's terms and conditions. *John Nevius v. Bangor Hydro-Electric Company, Appeal of CAD Decision dated May 14, 1996*, C.A.D. No. 23055, Order Opening Investigation and Reversing Ruling of the Consumer Assistance Division (Aug. 8, 1997). BHE has recently fixed the omissions and ambiguities that were brought to light by that case. BHE and other utilities may wish to review their terms and conditions more comprehensively for clarity. The process of electric restructuring may present such an opportunity.

## II. THE FIRST COMMISSION DECISION AND THE CAD DECISION ON REMAND

In our earlier Order we stated:

> 35-A M.R.S.A. § 301 . . . requires utilities to "furnish safe reasonable and adequate facilities and service." It follows that Bangor Hydro has a duty to perform a *reasonable* level of maintenance on property it owns and that is used to provide electric service to customers. We emphasize that the level of maintenance that the Company must perform on its property is one that is reasonable under all of the circumstances. We do not hold that the Company has an absolute "duty to keep all lines trimmed out" pursuant to a rigid schedule or even that a reasonable level of maintenance requires routine trimming for every line. The proper balance between the amount to spend on trimming and the desired level of system reliability has been an issue debated in many rate cases before the Commission. It is reasonable for a utility to prioritize its trimming. A line serving multiple customers might well receive higher priority for trimming than a single service drop that serves only one customer. For some lines, it may be reasonable for the Company to rely on inspections or customer reports and to remove only obvious risks. In reconsidering this matter, the C.A.D. should determine whether BHE acted reasonably under all the circumstances.

The earlier order asked a series of questions concerning the nature and extent of BHE's maintenance of lines. CAD in turn asked these questions of BHE. Based on those answers, CAD found that BHE's policy concerning the inspection, trimming and maintenance for secondary service lines is that it conducts none of those activities. Bangor Hydro argued to CAD, as it does now, that a policy requiring those activities would be too expensive. The CAD stated:

> BHE may be correct that inspection and trimming are not cost-effective when the cost of those activities is compared to the cost of the damage to the property of its customers that is likely to occur as a result of not performing maintenance. It may

> therefore be reasonable for BHE not to inspect or trim its portion of secondary lines provided that it is financially responsible for damage to customers' property that occurs as a result of that policy. In short, BHE's economic analysis of the cost-effectiveness of not performing any maintenance on its portion of secondary lines must take into account both the costs that BHE saves and the costs that its customers incur as a result of its policy.

In our October 1, 1996 Order, we stated that the reasonableness of BHE's actions in this case should be measured by the negligence standard. We also noted that section 7-A of BHE's terms and conditions limits BHE's liability to instances where the Company was either negligent or had a contractual obligation.

The CAD relied on the latter basis (contractual obligation) under section 7-A of BHE's terms and conditions. CAD determined:

> based on the information in this case . . . BHE's contract with each of its customers includes the obligation to meet its statutory obligation to 'furnish safe, reasonable and adequate facilities,' and that it may meet that obligation either by implementing and following a policy of inspection and trimming the portions of secondary lines that it owns *or* by paying for damage to customer-owned secondary facilities that result from tree-related damage to its portions of those facilities.

The CAD also found, "in the alternative," that BHE's failure to inspect and maintain its portion of secondary service lines was "negligent."

For reasons explained below, we do not agree that BHE's general statutory and contractual obligations to provide safe and reasonable facilities include the specific contractual obligation found by the CAD, or with the CAD's alternative conclusion that BHE's actions or inactions constituted negligence.

**III. DISCUSSION AND DECISION**

As described above, the CAD found that BHE has a statutory obligation under 35-A M.R.S.A. § 301 to "furnish safe, reasonable and adequate facilities . . . ." The CAD further found that

obligation is implicit in the contractual arrangement between BHE and its customers. Relying on section 7-A of BHE's terms and conditions (which states that the Company's liability shall be limited to instances of negligence or contractual obligation), the CAD ruled that BHE could meet its obligation either by implementing an inspection and maintenance along its portion of lines governed by section 3-J or by paying for damage to customer-owned secondary facilities that result from tree-related damage to its own portion of section 3-J facilities.

We agree that BHE has a statutory and contractual obligation to "furnish safe, reasonable and adequate facilities." We do not agree, however, that that general obligation includes the specific obligations found by the CAD. On the contrary, BHE's terms and conditions, approved by the Commission, govern the specific details of contractual arrangement between BHE and its customers. Section 3-J is one of those terms and conditions, and it addresses the obligations concerning poles on "long service drops" by stating specifically that poles "shall be furnished by the customer and shall be and remain the property of the customer." The obligations to furnish and own property ordinarily carry with them the obligations to maintain and replace the property.[3]

Section 3-J therefore defines the responsibility of both the customer and BHE with regard to various equipment that makes up a "long service drop." The customer is responsible for all poles and for all circuitry beyond the first 150 feet; the Company is responsible for the first 150 feet of circuitry. In general, the owner has the responsibility to replace that property regardless of who or what has caused damage to it.

Section 7-A of BHE's terms and conditions apparently creates an exception to that general duty where the Company has been

[3]Subsequent to the damage to Mr. Pomeroy's pole, BHE added a new section 3-K to its terms and conditions. Section 3-K classifies a "long service drop constructed pursuant to Section 3-J . . ." as a "privately owned line" and states that, "A customer shall be responsible to maintain equipment and to repair or replace damaged equipment on any portion of a privately-owned line that he or she owns."

We view these provisions of section 3-K as a clarification rather than as a change in policy. The obligations made more specific in section 3-K logically flow from the obligations to "furnish" and "own" the poles on a long service drop.

negligent. Thus, if the Company has been negligent with regard to the maintenance of its property and that negligence has caused harm to the other owner's property, section 7-A may make the Company "liable." In this case, the CAD did find "in the alternative" that BHE was negligent with regard to its maintenance of its portion of the Pomeroy long service drop. It is clear, however, that the CAD's conclusion that BHE was negligent was essentially as an alternative statement of its conclusion that BHE had a *contractual* obligation to perform some level of routine maintenance, or, in the event that it did not do so, to pay for harm.

The CAD's conclusion that BHE's actions or inactions constituted negligence is, to some extent, belied by its statement that BHE's cost-benefit analysis concerning secondary service lines may have been reasonable. The CAD did not find that any other actions or inactions by the Company constituted negligence, e.g., that BHE had specific knowledge of a hazardous situation that could cause damage either to its line or the customer's property and that it ignored the hazard. We therefore cannot affirm CAD's alternative conclusion that BHE was negligent. Although we earlier indicated that BHE has "some" maintenance obligation with respect to its portion of these lines, we requested that the CAD determine the possible extent of that obligation in light of a variety of considerations. Those considerations add up to a cost-benefit analysis. Although BHE's answers to the questions were somewhat conclusory, it is nevertheless clear that BHE claims that performing routine maintenance (inspection and/or trimming) of these lines would be inordinately expensive given the small number of customers served by "long service drops." The Company claims that a maintenance program that would include secondary service lines would cost an additional $1 million a year. Its present trimming budget is $1.5 million.

"Some" obligation to provide maintenance may consist only of the obligation to repair known outages or hazards if the cost-benefit balance is heavily weighted toward costs. To rule that BHE had a specific maintenance obligation with respect to Mr. Pomeroy's pole (beyond fixing a known outage or hazard), we would have to rule in effect that section 3-J (which places the entire responsibility on the customer regardless of cause) is an unjust and unreasonable term and condition. While it is difficult, on the present record, to determine the relative costs and benefits of providing routine maintenance on long service drops, we cannot find that they are so heavily weighted toward the benefit side that the allocation of responsibilities by section 3-J is unreasonable.

O R D E R I N G P A R A G R A P H

For the foregoing reasons, at the request of Bangor Hydro-Electric Company, we commence an investigation pursuant to 35-A M.R.S.A. § 1303. We reverse the order of the Consumer Assistance Division and rule that BHE's customer, Ronald Pomeroy, is responsible for the replacement of the damaged pole on his long service drop as defined in section 3-J of Bangor Hydro-Electric Company's terms and conditions.

Dated at Augusta, Maine this 17th day of April, 1998.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent

COMMISSIONER VOTING AGAINST: Hunt (See attached Dissenting Opinion.)

DISSENTING OPINION OF COMMISSIONER HEATHER F. HUNT

In this case, the customer's pole was damaged by a break in the line owned and maintained by the Company. It is beyond question that the Company has a duty to perform a reasonable level of maintenance on property that it owns and that is used to provide service to customers. The level of maintenance must be reasonable under the circumstances; the Company is not under any obligation to keep all lines trimmed pursuant to a rigid schedule. The Company may meet its obligation to customers in one of two ways: it may provide some maintenance to the lines it owns *or* pay for damage to customer-owned poles that results directly from damage to company facilities. The Company has discretion to use the approach that is most economical.

The majority relieves the utility of those obligations here. It instead places on the customer the economic burden of replacing his property that was damaged by the Company's property. I would not shift the economic burden under these facts to the customer.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 6(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which consideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.